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NO.

in the

Supreme Court
of the
United States

October Term, 1986

PHILLIP N. ADER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER THE PETITIONER WAS DENIED HIS RIGHT TO PRESENT HIS INSANITY DEFENSE AND DUE PROCESS OF LAW AS A RESULT OF THE DISTRICT COURT'S UNDULY RESTRICTIVE INTERPRETATION OF 18 U.S.C. § 20 AND FED. R. EVID. 704(b)

II.

WHETHER THE PETITIONER WAS DENIED HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL AS A RESULT OF THE PROSECUTOR'S "INDISPUTABLY IMPROPER" COMMENT DURING CLOSING ARGUMENT

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OPINION BELOW

The unpublished opinion of the United States Court of Appeals, for the Fourth Circuit, No. 86-5127, is reprinted in the Appendix to this Petition at App. 1-14. The table citation is reported at 816 F.2d 673 (4th Cir. 1987).

JURISDICTION

The decision sought to be reviewed by Writ of Certiorari was rendered April 10, 1987. Title 28 U.S.C. § 1254(1) is the statutory provision which confers jurisdiction on this Court to review the decision in question, wherein Petitioner is the losing party.

STATEMENT OF THE CASE

Leonard Reynolds, Jr., contacted the Gaston County Police Department on August 20, 1985, and told an official that he and Rollins M. Frazier had been kidnapped and assaulted in that County one day earlier. He said that Kay Huggins and an individual known as "Chick" had committed the crimes. Reynolds told police that these crimes resulted from Huggins' accusing Reynolds of stealing nine hundred pounds of marijuana from Reynolds' home. Petitioner was subsequently arrested. He was indicted on eight violations of various federal narcotics laws and one charge of kidnapping.

During Petitioner's jury trial, and after the Government rested, Petitioner called as his witness, Dr. Milton Burglass, an eminently qualified expert in psychiatry and neurophysiology. Dr. Burglass testified that Petitioner began smoking and selling marijuana at the age of twelve and that there have been "very few days" since 1943 until his late adult life when Petitioner did not smoke marijuana daily. Petitioner heavily used heroin and other injectable or opiate drugs in the 1950's.

In 1959, while serving a federal prison sentence, Petitioner participated in a drug research program called "MK ULTRA" administered by the Central Intelligence Agency at the Lexington Correctional Institute in Lexington, Kentucky. During the thirteen weeks of the program, Petitioner allowed Government doctors to administer LSD and other controlled substances in return for shortening his prison term. This program caused Petitioner to "fall in love with [LSD]." The LSD caused Petitioner to "hallucinate and have incredible things happen to [him]."

Dr. Burglass testified that between 1959 and 1984, Petitioner may have consumed more than 3,000 doses of LSD. Petitioner experienced psychotic states when concurrently using marijuana, LSD, and cocaine. Petitioner was said to go through cycles of being very disorganized, periods of manic-like activity and "other periods of drug intoxication."

During the times the alleged crimes occurred, Petitioner was smoking marijuana along with taking LSD, which Dr. Burglass described as "pouring gasoline on a burning fire." Petitioner's mental status was categorized by Dr. Burglass as substance abuse disorder, marijuana intoxication, along with physiological damage to the brain. The effect of these mental disorders was an anti-social personality and a compromise of higher level judgment and reasoning. Even without daily use, "one could easily expect to see the catolog [sic] of disturbances and disorders." Dr. Burglass concluded that Petitioner suffered from a "severe mental disease or defect" between July and September of 1985.

The District Court excluded additional, exculpatory testimony from Dr. Burglass tending to establish Petitioner's insanity defense. Out of the jury's presence, Dr. Burglass testified that a characteristic of Petitioner's disorders would be the inability to "appreciate the wrongfulness of his acts" during the time at issue. Petitioner was denied the right to present this testimony to the jury.

Petitioner took the stand and admitted he participated in the drug conspiracy. He testified at length about his history of drug use, and said he had been taking drugs at the time the alleged crimes occurred.

On rebuttal, the Government called Drs. George Fowles and Dennis O'Brien. Dr. Fowles testified that he took for granted Petitioner's prior drug abuse and drug-related experiences. Petitioner was given various cognitive and personality tests which revealed that Appellant functioned at a high average to superior range of intelligence.

Dr. O'Brien interviewed Petitioner six times, during which a retrospective account of Petitioner's life was discussed. Dr. O'Brien also accepted as fact Petitioner's drug history. He concurred with Dr. Fowles that Petitioner was not suffering from a severe mental disease or defect. However, both doctors testified that Petitioner was "antisocial, egocentric, grandiose, and oppositional" and that his cognitive controls were "tenuous."

During the charge to the jury, the District Court explained the "Jury Notations of Verdict," (hereinafter Verdict Form) as follows:

> Now, before you go back to the jury room, I will hand to the jury a paper which is entitled Jury Notation of the Verdict with the defendant's name up at the top. Now, each count which you are to consider is set out in this verdict form. The first one, as to Count One, the jury finds the defendant—you write in there either guilty or not guilty, as you find it. Now, if—and this appears right below that statement—if the jury has answered this count guilty, then does the jury find the defendant not guilty only by reason of insanity, and you check that either yes or no. In other words, as to Count One, if you find the defendant not

guilty, you don't have to get into the insanity. If you find him guilty, then you would decide whether or not he is not guilty only by reason of insanity. The same goes as to Count Three, Count Four, Count Sixteen, Count Seventeen. (App. 15).

By way of illustration, the Verdict Form, in pertinent part, provided as follows:

JURY NOTATIONS OF VERDICT: C-CR-85-97

DEFENDANT'S NAME: PHILLIP N. ADER

Insert whether you have found the defendant "guilty" or "not guilty."

AS TO COUNT ONE THE JURY FINDS THE DEFENDANT _____

If the jury has answered this Count "Guilty", then does the jury find the Defendant "Not Guilty" only by reason of insanity?
____ (YES) ____ (NO) (Check *either* "YES" or "NO"). (App. 16-17).

The jury found Petitioner guilty of three violations: conspiracy to distribute nine hundred pounds of marijuana, possession with intent to distribute nine hundred pounds of marijuana, and possession with intent to distribute sixty pounds of marijuana. Petitioner was found not guilty of kidnapping, and conspiracy with intent to distribute eleven hundred pounds of marijuana.

REASONS FOR GRANTING THE WRIT

I.

THE PETITIONER WAS DENIED HIS RIGHT TO PRESENT HIS INSANITY DEFENSE AND DENIED DUE PROCESS OF LAW AS A RESULT OF THE DISTRICT COURT'S UNDULY RESTRICTIVE INTERPRETATION OF 18 U.S.C. § 20 AND FED. R. EVID. 704(b)

A. THE DECISION BELOW PRECLUDES THE ESTABLISHMENT OF THE FEDERAL INSANITY DEFENSE AS CODIFIED IN 18 U.S.C. § 20 (1984) and FED. R. EVID. 704(b).

Under Fed. R. Evid. 704(b) and 18 U.S.C. § 20, an expert witness should be allowed to inquire about a defendant's asserted insanity by using a two-prong approach. First, the expert should be asked, based upon a reasonable medical certainty and probability, if he has an opinion whether the Defendant was suffering from a major mental disease or defect at the time of the offense. Second, the expert should be asked, based on a reasonable medical certainty and probability, if he has an opinion as to whether the Defendant was unable to appreciate the nature and quality, or wrongfulness, of his actions.

Both the District Court and the United States Court of Appeals for the Fourth Circuit misapplied the above rule, depriving Petitioner of fully presenting his insanity defense.

At issue is the second prong of the insanity test, which the Fourth Circuit interpreted in *United States v. Mest*, 789 F.2d 1069 (4th Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 163 (1986), the only case in the Circuit dealing with the issue. *Mest* affirmed the impropriety of an expert witness testifying as to whether a defendant "had the capacity to conform his behavior to the requirements of the law should he have so chosen." 789 F.2d at 1071. According to the Fourth Circuit, this question called for psychiatrists to testify about the legal concept of insanity, which should be a matter left solely to the jury.

In its opinion below, the Fourth Circuit held that Petitioner's question to Dr. Burglass, whether Petitioner was unable to "appreciate the wrongfulness of his behavior," was synonymous with the *Mest* question, and therefore, objectionable. The Court reasoned as follows:

> The legislative history of Rule 704(b) shows clear congressional intent to permit expert testimony as to the predicate medical portion of the defense—the existence in the defendant of a severe mental disease or defect. It shows no similar intent to permit expert testimony as to the resulting legal portion of the offense—the defendant's inability to appreciate the wrongfulness of his acts. If we were to force the statute into a symmetrical frame as Ader [Petitioner] suggests, we would emasculate Rule 704(b). (App. 10).

The flaw in the Court's reasoning is that it omitted key legislative history underscoring the importance of

experts testifying about the defendant's mental state at the time the alleged crimes were committed. The unreviewed history provides:

> Psychiatrists, of course, must be permitted to testify fully about the defendant's diagnosis, mental state and motivation (in clinical and common sense terms) at the time of the alleged act so as to permit the jury or judge to reach the ultimate conclusion about which they and only they are expert. Determining whether a criminal defendant was legally insane is a matter for legal fact-finders, not for experts.
>
> Insanity Defense Reform Act of 1984 (IDRA), Act of Oct. 12, 1984, Pub.L.NNo. 98-473, 1984 U.S. Code Cong. & Ad. News (98 Stat.) 3413.

Petitioner submits that the above history supports his argument that not only is *Mest* being misapplied, but that the question profferred to Dr. Burglass was proper. By being unduly limited in his scope of examination, Petitioner was denied a fair and impartial trial, his right to effectively present a valid defense and due process of law.

B. THE DECISION BELOW POSES A QUESTION UNANSWERED BY THIS COURT REGARDING THE SPECIAL VERDICT FORM USED WHEN THE DEFENSE OF INSANITY IS ASSERTED.

Title 18 U.S.C. § 4242(b) requires the use of a special verdict form when the affirmative defense of insanity is raised. Section 4242(b) provides:

> Special verdict.—If the issue of insanity is raised by notice as provided in Rule 12.2 of the Federal Rules of Criminal Procedure on motion of the defendant or of the attorney for the Government, or on the court's own motion, the jury shall be instructed to find, or, in the event of a nonjury trial, the court shall find the defendant—
>
> (1) *guilty*;
>
> (2) *not guilty*; or
>
> (3) *not guilty only by reason of insanity*.
>
> [Emphasis added].

This form was purposely designed to provide for the insanity defense since previously there was no such provision. Act of Oct. 12, 1984, Pub.L.No. 98-473, 1984 U.S. Code Cong. Ad. News (98 Stat.) 3422.

The District Court created its own unique form wherein the jury had to choose whether Appellant was: Guilty, not guilty, or guilty/not guilty only by reason of insanity. (App. 13). Aside from the fact that the District Court was legislating by designing its own verdict form, the form itself was prejudicial to Petitioner. The form led the jury to believe that had Petitioner been insane, he still could have been guilty of committing the crimes. This is contrary to the purpose of the insanity defense, which is to show that at the time the crime was committed, the defendant was incapable of forming the necessary *mens rea*.

Likewise, the Fourth Circuit acknowledged that it had "some reservations" about the District Court's form because it implied that "not guilty by reason of insanity" is a subspecies of "guilty." In a "bootstrap" effort to support its conclusion that the verdict form was not misleading, the Court below noted that the jury found Petitioner guilty on three counts, without additionally finding him "not guilty by reason of insanity." (App. 14). The Fourth Circuit also noted that the jury found him not guilty on two counts and failed to mention if these acquittals were on the merits or by reason of insanity. (App. 14).

Petitioner has been denied a statutorily created right and due process of law. The decision below presents an important federal question which should be reviewed by this Court.

II.

THE PETITIONER WAS DENIED HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL AS A RESULT OF THE PROSECUTOR'S "INDISPUTABLY IMPROPER" COMMENT DURING CLOSING ARGUMENT

At the conclusion of the Government's rebuttal closing argument, the prosecutor stated:

> [Prosecutor]: Mr. Hirschhorn wants to bring up that there are other charges out here, I guess saying, 'You let him go today, and somebody else will get him tomorrow.' *Well, if this jury passes on insanity today, no telling*

what might happen to him as to the other charges and other acts Mr. Ader has committed or will commit.

[App. 7; Emphasis added].

Astonishingly, Petitioner's Motions to Strike and for a Mistrial were denied. On the following day, after the jury was charged, the District Court instructed the jury to disregard the comment regarding the possibility of Petitioner committing future crimes.

Although the Fourth Circuit found the quoted remarks to be "indisputably improper" (App. 7), the Court held that no reversible error was committed because of the "isolated nature of the impermissible remarks," and that a curative instruction was given. (App. 8).

Petitioner submits that the curative instruction was woefully inadequate given the extreme prejudicial nature of this remark. In essence, the prosecutor told the jury that to find the Petitioner not guilty by reason of insanity would be licensing him to commit future crimes. No instruction could purge this type of remark from the minds of the jurors.[1]

---

[1]The Fourth Circuit apparently disregarded the oft-quoted and highly appropriate observation of Mr. Justice Jackson in *Krulewitch v. United States*, 336 U.S. 440, 453, 69 S.Ct. 716, 723 (1967), that "the naive assumption that prejudicial effects can be overcome by [cautionary] instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."

The effect of this "indisputably improper" comment was not diminished merely because it was "isolated." The remark was made at the close of the prosecutor's rebuttal, thereby causing the greatest damage since it was the last argument the jury heard. Petitioner was unable to counter or address the remark in any way. Unfortunately, the jury was permitted to dwell on this inflammatory comment overnight before being told to disregard it.

The Government's plea to the jury to disregard the insanity defense and to convict Petitioner to prevent his commission of crimes in the future deprived him of due process of law and a fair and impartial trial.

CONCLUSION

Petitioner has been denied basic fundamental rights guaranteed by the United States Constitution and seeks relief in this Court to restore those rights. Based on the arguments and authorities cited herein, Petitioner, Phillip N. Ader, respectfully requests this Honorable Court to grant the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, and reverse that Court's decision.

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-5127

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

PHILLIP N. ADERS, a/k/a Chick

Defendant-Appellant

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert D. Potter, Chief District Judge. (CR-85-97)

Argued: March 4, 1987. Decided: April 10, 1987

Before RUSSELL and HALL, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

Joel Hirschhorn for Appellant; Max Oliver Cogburn, Jr, Chief Assistant United States Attorney (Charles R. Brewer, United States Attorney on brief) for Appellee.

PER CURIAM:

This case concerns the parameters of the insanity defense under recent revisions in federal law. Appellant Phillip Ader was charged with four counts of narcotics violations and one count of kidnapping, to all of which he interposed the insanity defense. Ader was acquitted of kidnapping and one count of conspiracy to distribute marijuana; he was convicted on another count of conspiracy to distribute marijuana and two counts of possession with intent to distribute marijuana. He now appeals his convictions both as to the substantive offenses and as to his affirmative defense of insanity. We affirm.

I.

Ader was an associate of Kay Huggins, a drug trafficker who was transporting marijuana in his motor home from the Gulf area of Louisiana to New York. When Huggins' motor home developed problems he arranged to store 900 pounds of the marijuana for a few weeks with Leonard Reynolds, a drug trafficker who lived in Mt. Holly, North Carolina. However, Reynolds and his associate Rollins Frazier stole Huggins' marijuana and moved it to a mini-storage warehouse in Kingsport, Tennessee. When Huggins discovered the theft he called in Ader and another associate known as "Jim Bob." They took Reynolds to a cabin in the woods where they gave him a polygraph examination and Jim Bob beat Reynolds. Reynolds admitted stealing the marijuana and revealed its location. Reynolds was then released, and Huggins and Ader went to Kingsport with Frazier to retrieve the goods.

Reynolds, apparently shaken by his experience, called the police in Kingsport. He told them about the beating and the marijuana stored in the warehouse, and also said that Frazier had been kidnapped. Reynolds surrendered himself to the police the next day.

After the drug traffickers retrieved the marijuana in Kingsport they returned to Charlotte, North Carolina, where they released Frazier. About two weeks later, on September 4, 1985, the Charlotte police, acting on information from a confidential source, located Ader, surveilled him for a while, and then arrested him in his car. During a search of Ader and of the car incident to the arrest, the policy found a warehouse key and receipt which led to the discovery of about 60 pounds of marijuana and assorted drug paraphernalia in a mini-storage locker.

Reynolds and Frazier negotiated plea agreements and testified for the government at Ader's trial. Ader's sole witness, other than himself, was Dr. Milton Burglass, an expert in psychiatry, neurophysiology, and medicine. Burglass testified that Ader had smoked marijuana nearly every day since 1943; that in the 1950s Ader was involved with heroin and other injectable or opiate drugs; that in 1959, while serving a federal prison sentence, Ader had participated in a drug research program administered by the Central Intelligence Agency that involved LSD and other controlled substances; that between 1959 and 1984 Ader may have consumed over 3,000 doses of LSD; and that Ader frequently used marijuana, LSD, and cocaine in conjunction with each other. Dr. Burglass then testified that Ader had a severe mental disease characterized as substance abuse disorder, marijuana intoxication, and

physiological damage to the brain.[1] Burglass attempted to testify that because of this mental disease Ader could not appreciate the wrongfulness of his acts, but the court excluded this testimony.

II.

We can dispense quickly with many of the issues Ader raises on appeal. At trial Ader apparently admitted to his participation in the specific drug operations for which he was convicted. Therefore we find it unnecessary to address the assignments of error that bear only on his guilt or innocence of those crimes. These alleged errors include the admission of Reynold's and Frazier's plea agreements including reference to their participation in the Federal Witness Protection Program, *see United States v. Melia*, 691 F.2d 572 (4th Cir. 1982), and the jury instruction on the defendant's credibility.

Similarly, we need not address the court's alleged errors in failing to suppress the fruits of the search incident to the arrest because these again relate to a crime in which Ader admitted participation. Ader makes no representation that but for the court's failure to suppress he would not have made this admission.

Further, we need not address the court's alleged error in admitting hearsay testimony regarding Frazier's statements to his then-attorney. Those

---

[1]Burglass listed the psychiatric disorders as catalogued in the *Diagnostic and Statistical Manual of the American Psychiatric Association* (3d ed. 1980): DSM III 305.31, 304.31, 292.11, 305.20, 292.12, 292.81, and 301.70.

statements have relevance only to the kidnapping count, and Ader was acquitted of that charge.

III.

Ader asserts several errors related to his use of the insanity defense, and these are not affected by his in-court admission. The first alleged error concerns remarks made by the government during closing argument. In the initial opening remarks the prosecutor made the following comments:

> Let me remind you of one other thing, and that is, during all of the testimony concerning it, you didn't hear the testimony of a single defense witness that knew him or associated with him on an everyday basis. Where were his neighbors? Where were his relatives? Where are his friends that could come in here and shed some light on how he acted daily. No, instead, you have one witness from Harvard--well paid--who comes in here and gives you exactly what you would need to hear, if you can believe it, to effectuate a mental defense. Why couldn't the other people come and tell you how he acted on a daily basis? You know, did he run around the neighborhood without clothes or did he slam doors or kick out windows, or did he yell and scream, or where were the ordinary people that know him? The doctor doesn't know him. This doctor didn't know him. The government's doctor didn't know him. Nobody that was with him during the times in question came in to testify.

On rebuttal the prosecutor referred again to Ader's failure to produce additional witnesses, other than just the defendant and a psychiatrist. The prosecutor also attacked the psychiatrist, Dr. Burglass, as shown in the following exchange:

> MR. COGBURN: Then you get Dr. Burglass. No report filed by him at all.
>
> MR. HIRSCHHORN: I object. Dr. Burglass was not under a duty to file a report with the court, and that is misleading.
>
> THE COURT: It is a fact he did not file a report.
>
> MR. HIRSCHHORN: He doesn't have to file a report.
>
> THE COURT: I understand, but he didn't file one. Overruled.
>
> MR. COGBURN: He doesn't have to file a report, but wouldn't it be nice if he knows the fellow is up there being examined, if he wanted him to have the information Dr. Burglass had, if they really wanted him to have the information, wouldn't it be nice if they had sent the report up there, if they had gotten this report?

Finally, the prosecutor closed his rebuttal as follows:

> Mr. Hirschhorn wants to bring up that there are other charges out here, I guess saying,

> "You let him go today, and somebody else will get him tomorrow." Well, if this jury passes on insanity today, no telling what might happen to him as to the other charges and other acts Mr. Ader has committed *or will commit.* (emphasis added).

Contrary to Ader's contention, the first set of quoted remarks did not impermissibly shift the burden of proof. Under 18 U.S.C. § 20(b) (1982 & Supp. III) the defendant has the burden of proving insanity. We also see no reversible error in the government's comment on the small number of defense witnesses. *See United States v. Schultz,* 698 F.2d 365 (8th Cir. 1983) (no error in government's remark concerning defendant's failure to call available alibi witness).

Similarly, we find no reversible error in the second set of quoted remarks concerning the fact that Dr. Burglass did not file a report. The fact that Burglass was not required to file a report, but that the government's doctors *were* required to file reports under Fed. R. Crim. P. 16(d) and the Jencks Act, 18 U.S.C. § 3500, apparently was brought out to some extent during cross-examination of the witnesses, and the remark was therefore appropriate as a means of attacking Dr. Burglass' credibility. The fact that Dr. Burglass had no legal obligation to file a report was further brought out during the quoted exchange.

Finally, the last three words of the third set of quoted remarks are indisputably improper because they direct the jury to consider whether the defendant will commit future crimes if he is not convicted of the present charges. Although the court initially overruled the

objection to this remark, charged the jurors, and excused them for the night, the court called the jurors back the following morning and gave them a curative instruction regarding future crimes. It would have been preferable if the court had given the curative instruction immediately following the improper remark, but we cannot say that the delay was so great as to constitute reversible error, especially given the isolated nature of the impermissible remarks.

IV.

Ader next contends that the court erred in allowing Dr. Burglass to testify that Ader suffered from a severe mental disease but prohibited him from testifying that Ader was unable to appreciate the wrongfulness of his acts. Under 18 U.S.C. § 20(a) (1982 & Supp. III), the affirmative defense of insanity requires proof that "at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his act." And under Fed. R. Evid. 704(b):

> No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Few courts have yet had an opportunity to explore the scope of Rule 704(b). In the only case in this circuit

addressing the rule, *United States v. Mest*, 789 F.2d 1069 (4th Cir.), *cert. denied*, 107 S.Ct. 163 (1986), we affirmed the impropriety of the question: "Do you have an opinion as to whether or not the defendant at the time of this alleged event could by virtue of his mental condition, discern the wrongfulness of his behavior and had the capacity to conform his behavior to the requirements of the law should he have so chosen?" *Id.* at 1071. Although in *Mest* we were primarily concerned with the retroactive application of Rule 704(b), we discussed the scope of the rule by citing its legislative history. *Id.* at 1072 n.2. That history shows congressional intent that psychiatrists be limited to testifying about medical concepts, not legal concepts.

For example, juries should not hear conflicting psychiatric testimony that the defendant is "sane" or "insane," or that he does or does not meet the relevant legal test for insanity. *Id.* The psychiatrist is limited to testifying as to whether or not, in his opinion, the defendant had a severe mental disease or defect and what the characteristics of such a disease or defect, if any, may have been. *Id.* In consonance with this legislative history the Advisory Committee notes to Rule 704 illustrate permissible and impermissible questions: "The question, 'Did T have capacity to make a will?' would be excluded, while the question, 'Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?' would be allowed."

Ader suggests that the ultimate issue--the only question Dr. Burglass could not answer--was "Was the

defendant insane?" We reject this suggestion as fatuous. The ultimate issue is defined by the language of the statute setting out the defense, not by a shorthand expression. Ader next suggests that if Dr. Burglass was permitted to express an opinion as to the first half of the issue, "Did Ader suffer from a severe mental disease?" he would equally have been permitted to express an opinion as to the second half of the issue, "Was Ader able to appreciate the wrongfulness of his acts?" This argument offers an attractive symmetry, but examination of the statute shows that it is not symmetrically composed. The inability to appreciate the wrongfulness of one's acts must be the *result* of a severe mental disease or defect. The statute thus imposes a sense of directionality on its parts, and makes one part dependent upon the other. The legislative history of Rule 704(b) shows clear congressional intent to permit expert testimony as to the predicate medical portion of the offense--the existence in the defendant of a severe mental disease or defect. It shows no similar intent to permit expert testimony as to the resulting legal portion of the offense--the defendant's inability to appreciate the wrongfulness of his acts. If we were to force the statute into a symmetrical frame as Ader suggests, we would emasculate Rule 704(b).[2]

Our conclusion does not leave the defendant without means of persuading the jury of his inability to appreciate the wrongfulness of his acts. In addition to expressing an opinion that the defendant suffers from a severe mental disease or defect, the expert may testify

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[2]Similarly, if we were to force the statute into a symmetrical frame and prohibit expert testimony as to the existence of a severe mental disease or defect, we would emasculate the insanity defense.

as to the characteristics of that disease or defect, if any. *Mest, supra*, at 1172 n.2. These characteristics are merely an amplification of the predicate medical portion of the defense. The court recognized this and gave Ader great latitude in examining Dr. Burglass. Under *Mest*, Ader could have asked Dr. Burglass to testify about the characteristics of Ader's mental disease because that is a medical question, but he could not testify that Ader himself manifested those characteristics if that was a legal question. Thus, if an inability to appreciate the wrongfulness of one's conduct were a legitimate characteristic of Ader's mental disease, Dr. Burglass could have testified as to that medical fact. But Dr. Burglass could not state the legal conclusion that Ader himself was unable to appreciate the wrongfulness of his acts. The record shows that Ader asked Dr. Burglass, "Is one of the characteristics of the mental disease or defect which you have diagnosed, *Mr. Ader's* inability to appreciate the nature or the wrongfulness of his acts?" (emphasis added). The court properly sustained the objection to this question because it required Dr. Burglass to state an opinion about Ader's own mental state or condition rather than merely reciting, in an abstract medical way, a characteristic of Ader's mental disease or defect.

Our emphasis on the exact phraseology of the question may appear to be putting form before function, but this is the essence of Rule 704(b). As we said in *Mest* at 1071-72:

> [T]he change in the rules of evidence effected by the enactment of Rule 704(b) does not receive less or different testimony in order to

> convict the offender but, rather, changes the style of question and answer that can be used to establish both the offense and the defense thereto. Every actual fact concerning the mental condition of the defendant presentable by the defense's psychiatrist or, for that matter, the government's psychiatrist is still as admissible and as required after the enactment of 704(b) as before. The change, rather, is to whether either of these categories of witnesses can instruct the trier of fact (in this instance, the jury) as to what its findings should be on the factual questions about which the witness could before and can now testify.

In other words, Rule 704(b) effected a procedural change concerned with the phraseology of questions concerning mental state or condition.

Because Ader improperly phrased his question to Dr. Burglass and tried to elicit an opinion on Ader's own ability to appreciate the wrongfulness of his acts rather than the characteristics of Ader's mental disease or defect, we find no error in the court's exclusion of this opinion.

V.

Ader's final assertion of error regarding the insanity defense concerns the form used for the jury's notation of verdict. 18 U.S.C. § 4242(b) (1982 & Supp. III) now requires the use of a special verdict whenever the defendant pleads insanity:

> If the issue of insanity is raised by notice as provided in Rule 12.2 of the Federal Rules of Criminal Procedure on motion of the defendant or of the attorney for the Government, or on the court's own motion, the jury shall be instructed to find, or, in the event of a nonjury trial, the court shall find the defendant--
>
> (1) guilty;
>
> (2) not guilty; or
>
> (3) not guilty only by reason of insanity.

A verdict of not guilty by reason of insanity empowers the court to commit an acquitted defendant to a mental hospital. *See United States v. Teller*, 762 F.2d 569 (7th Cir. 1985).

The court's jury instructions and verdict notation form did not offer these three choices for each charge. Instead, for each count the court first required the jury to indicate whether they found the defendant guilty or not guilty. The verdict form then read, "*If* the jury has answered this Count 'Guilty,' then does the jury find the Defendant 'Not Guilty' only by reason of insanity?" (emphasis in original). Ader contends that this form was improper as a matter of law because it did not conform to section 4242(b), and because it was potentially confusing to the jury.

We have some reservations about the court's verdict notation form because it implies that "not guilty by reason of insanity" is a subspecies of "guilty". Section 4242(b) appears to set up three co-equal verdict choices

rather than a hierarchy of choices. Further, the statute requires that whenever the jury determines that the defendant is not guilty, they must signify whether their acquittal is based on insanity or on the merits; the court's verdict notation form deprives the court of this information.

Nonetheless, we cannot say that the deviations in this case were sufficient to prejudice the defendant and require reversal. The jury here found Ader guilty on three counts and dutifully noted that for these three counts he was not "not guilty only by reason of insanity." The jury also found him not guilty on two counts and, in accordance with their instructions, did not indicate whether these acquittals were on the merits or by reason of insanity. We can infer, however, from the verdicts as a whole, that if the court had used a verdict notation form closer to that suggested by section 4242(b), the jury would have found Ader guilty on three counts and not guilty (on the merits) on two counts. Therefore any error in the verdict notation form is harmless in this case.

For the reasons stated above, the judgments of convictions of the appellant are

AFFIRMED.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION

DOCKET NO. C-CR-85-97

Charlotte, N.C.
June 9, 1986
9:30 A.M.

UNITED STATES OF AMERICA,

Plaintiff,

v.

PHILLIP NORMAN ADER,

Defendant.

[The Court]

Now, before you go back to the jury room, I will hand to the jury a paper which is entitled Jury Notations of the Verdict with the defendant's name up at the top. Now, each count which you are to consider is set out in this verdict form. The first one, as to Count One, the jury finds the defendant--you write in there either guilty or not guilty, as you find it. Now, if--and this appears right below that statement--if the jury has answered this count guilty, then does the jury find the defendant not guilty only by reason of insanity, and you check that either yes or no. In other words, as to Count One, if you find the defendant not guilty, you don't have to get into the insanity. If you find him guilty, then you would decide whether or not he is not guilty only by reason of insanity. The same goes as to Count Three, Count Four, Count Sixteen, Count Seventeen.

[FILED JUN 12 1986]

JURY NOTATIONS OF VERDICT: C-CR-85-97

DEFENDANT'S NAME: PHILLIP N. ADERS

Insert whether you have found the defendant "guilty" or "not guilty."

AS TO COUNT ONE THE JURY FINDS THE DEFENDANT NOT GUILTY.

If the jury has answered this Count "Guilty," then does the jury find the Defendant "Not Guilty" only by reason of insanity? (Check *either* "YES" or "NO".) ____ (YES) ____ (NO)

AS TO COUNT THREE THE JURY FINDS THE DEFENDANT GUILTY.

If the jury has answered this Count "Guilty," then does the jury find the Defendant "Not Guilty" only by reason of insanity? (Check *either* "YES" or "NO".) ____ (YES) ✓ (NO)

AS TO COUNT FOUR THE JURY FINDS THE DEFENDANT GUILTY.

If the jury has answered this Count "Guilty," then does the jury find the Defendant "Not Guilty" only by reason of insanity? (Check either "YES" or "NO".)

___ (YES) ✓ (NO)

AS TO COUNT SIXTEEN THE JURY FINDS THE DEFENDANT GUILTY.

If the jury has answered this Count "Guilty," then does the jury find the Defendant "Not Guilty" only by reason of insanity? (Check *either* "YES" or "NO".)

___ (YES) ✓ (NO)

AS TO COUNT SEVENTEEN THE JURY FINDS THE DEFENDANT NOT GUILTY.

If the jury has answered this Count "Guilty," then does the jury find the Defendant "Not Guilty" only by reason of insanity? (Check *either* "YES" or "NO".)

___ (YES ___ (NO)

/s/ JOE B. BAKER 6-12-86

SIGNATURE OF JURY FOREPERSON DATE

(2)

Supreme Court, U.S.
FILED
AUG 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1950

In the Supreme Court of the United States

OCTOBER TERM, 1987

PHILLIP N. ADER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was denied his right to present his insanity defense because the district court disallowed testimony from a psychiatrist that at the time petitioner committed the crimes in question, he was unable to appreciate the wrongfulness of his acts.

2. Whether the verdict form used by the district court met the requirement of 18 U.S.C. (Supp. III) 4242(b) that a special verdict be returned in cases involving insanity pleas.

3. Whether the prosecutor's rebuttal argument prejudiced petitioner's right to a fair trial.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 816 F.2d at 673 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1987. The petition for a writ of certiorari was filed on June 8, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of North Carolina, petitioner was convicted of conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846 (Count 3), and possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Counts 4 and 16).[1] He was sentenced to consecutive terms of ten years' imprisonment on each of Counts 3 and 4, and to a concurrent two-year term of imprisonment on Count 16. In addition, he was sentenced to a six-year special parole term on Count 4 and a four-year special parole term on Count 16.

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 2-3). Petitioner was an associate of Kay Huggins, a drug trafficker who was transporting marijuana in his motor home from Louisiana to New York. Huggins's motor home developed problems, and he arranged to store 900 pounds of the marijuana for a few weeks at the North Carolina home of drug trafficker Leonard Reynolds. Reynolds and his associate Rollins Frazier, however, stole Huggins's marijuana and moved it to a mini-storage warehouse in Kingsport, Tennessee. When Huggins discovered the theft he called in petitioner and another associate known as "Jim Bob." Petitioner and Jim Bob took Reynolds to a cabin in the woods, where they gave him a polygraph examination and Jim Bob beat Reynolds. Reynolds admitted stealing the marijuana and revealed its location. After releasing Reynolds, petitioner and Huggins

---

[1] Petitioner was acquitted on one count of kidnapping and one count of conspiracy to distribute marijuana.

went with Frazier to Kingsport to recover the marijuana. After retrieving the marijuana in Kingsport, petitioner and Jim Bob returned to North Carolina, where they released Frazier. Reynolds later reported the events to the police, who arrested petitioner. During a search of petitioner's car, the police found a warehouse key and receipt that led to the discovery of about 60 pounds of marijuana and assorted drug paraphernalia in a mini-storage locker.

2. Petitioner's defense at trial was that he was legally insane at the time he committed the offenses in question. His sole witness at trial other than himself was Dr. Milton Burglass, an expert in psychiatry, neurophysiology and medicine (II Tr. 416-417). Dr. Burglass testified that petitioner had smoked marijuana nearly every day since 1943 (II Tr. 461); that in the 1950's petitioner was heavily involved with heroin and other injectable narcotics or opiate drugs (*ibid.*); that in 1959, while serving a federal prison sentence, petitioner had participated in a drug research program administered by the Central Intelligence Agency that involved LSD and other controlled substances (II Tr. 444-446); that between 1959 and 1984 petitioner may have consumed more than 300 doses of LSD (II Tr. 467); and that petitioner frequently used marijuana, LSD, and cocaine in conjunction (II Tr. 465-466). Dr. Burglass testified that after using marijuana heavily, petitioner would go through a frenzied, manic state during which his judgment would be markedly impaired and he would be totally irrational (II Tr. 465). According to Dr. Burglass, when petitioner used marijuana in conjunction with LSD and cocaine, he would go into a psychotic state in which he lost touch with reality (II Tr. 466).

Dr. Burglass then testified that at the time of his arrest petitioner was suffering from substance abuse disorder, marijuana dependence, and physiological brain damage (II Tr. 473-474). One of the characteristics of the mental disease identified by Dr. Burglass was a significant compromise of "[c]onduct that involves higher level judgment and reasoning and longer term planning and evaluation of consequences down the line" (II Tr. 480).

Outside the presence of the jury, petitioner's counsel then proffered testimony by Dr. Burglass that at the time of his arrest petitioner "would * * * certainly not [have] been able to appreciate the wrongfulness of his acts" (II Tr. 482-484). The trial court disallowed this testimony on the ground that it fell within the prohibition of Fed. R. Evid. 704(b), which enjoins an expert witness from stating an opinion as to whether a defendant "did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto" (II Tr. 484-485).

In his summation to the jury, defense counsel made the following argument (IV Tr. 32 (opening and closing statements)):

> Now, understand that [petitioner's] days behind a desk like this in a court of law like this before juries are not yet over. You heard the evidence. He's got music to face in Gaston County yet. You heard, I think, during one of the government's witnesses or during opening statement, a reference to the fact that Reynolds hadn't been taken across state lines; therefore, it wasn't a federal kidnapping. That that was a state matter. So, ladies and gentlemen of the jury, there's many more miles to go, many more roads to

> travel, before [petitioner] ever sees what you and I cherish so dearly.

In response to defense counsel's argument, the prosecutor made the following statement during rebuttal summation (Pet. App. 6-7; IV Tr. 64):

> [Defense counsel] wants to bring up that there are other charges out here, I guess saying, "You let him go today, and somebody else will get him tomorrow." Well, if this jury passes on insanity today, no telling what might happen to him as to the other charges and other acts [petitioner] has committed or will commit.

Defense counsel objected to this statement. Subsequently, after the jury had been instructed on the law and excused for the day, defense counsel moved for a mistrial (III Tr. 668-669). The district court denied the motion on the ground that the prosecutor's statement was not so prejudicial as to warrant a mistrial (III Tr. 670). The next morning, the court gave the following instruction to the jury (III Tr. 670-671):

> Now, Members of the Jury, I recall that last night just at the end of the prosecutor's statements to you, that he mentioned something about the fact that—and you'll have to remember the words—to the effect that if the defendant, if you didn't find the defendant guilty, no telling what he might do, or words to that effect. Now, the only thing you're concerned with in this case is whether or not the defendant was guilty of the crimes charged. You will not consider anything about what he will do or may do in the future. It is up to you to decide whether or not the government has produced evidence beyond a reasonable doubt to satisfy you that the defendant is guilty of the crimes charged under the instructions of the Court * * *.

In its closing instructions, the district court explained that if the jurors found petitioner guilty on any of the counts, they should then determine whether petitioner was not guilty on those counts only by reason of insanity (Pet. App. 15; III Tr. 664-665, 671). The verdict form that the jury received (Pet. App. 13, 16) similarly required the jurors first to indicate as to each count whether they found petitioner guilty or not guilty. The form then read (Pet. App. 16 (emphasis in original)):

> *If* the jury has answered this Count "Guilty," then does the jury find [petitioner] "Not Guilty" only by reason of insanity? (Check *either* "YES" or "NO".) ——(YES) ——(NO)

3. The court of appeals affirmed petitioner's convictions (Pet. App. 1-14). The court found that the district court properly excluded Dr. Burglass's testimony that petitioner could not appreciate the wrongfulness of his acts. Such testimony, held the court, would have represented an opinion as to an ultimate legal issue concerning petitioner's mental state and was therefore prohibited by Fed. R. Evid. 704(b). Pet. App. 8-12. The court agreed with petitioner as to the impropriety of the prosecutor's reference during closing argument to acts petitioner might commit in the future, a statement the court viewed as directing the jury to consider whether petitioner "[would] commit future crimes if he [was] not convicted of the present charges" (Pet. App. 6-7). The court of appeals also agreed that it would have been preferable for the district court to have given an immediate curative instruction following the improper remark, rather than waiting until the following morning to do so. The court, however, rejected

petitioner's claim that the delay in giving the instruction resulted in prejudice that called for reversal, especially given the isolated nature of the prosecutor's remark. Pet. App. 7-8.

Finally, the court of appeals rejected petitioner's claim that the district court's instructions concerning the verdict, and the verdict form that was used, deviated so far from the requirements of 18 U.S.C. (Supp. III) 4242(b) as to constitute reversible error. The court expressed reservations about the verdict notation form but found that even if the district court had used a form closer to the one suggested by Section 4242(b), the jury still would have found petitioner guilty on three counts and not guilty (on the merits) on two counts. Pet. App. 13-14.

ARGUMENT

1. Petitioner argues (Pet. 7-9) that the district court prevented him from fully presenting his insanity defense by excluding testimony from Dr. Burglass that petitioner was unable to appreciate the wrongfulness of his actions.

The Comprehensive Crime Control Act of 1984 (Pub. L. No. 98-473, Tit. II, § 402(a), 98 Stat. 2057) made two changes in the federal insanity defense. First, the Act added a new provision, now 18 U.S.C. (Supp. III) 20,[2] which defines the in-

[2] 18 U.S.C. (Supp. III) 20 provides:

Insanity Defense

(a) Affirmative defense.—It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or

sanity defense and provides that the defendant has the burden of proving insanity by clear and convincing evidence. Second, Congress limited the scope of expert testimony on the defendant's insanity by prohibiting experts from voicing an opinion as to whether the defendant had the mental state or condition constituting an element of the offense or of a defense. Fed. R. Evid. 704(b).[3] Under the new rule, when an insanity defense is raised, experts are not permitted to testify that the defendant's mental condition rendered him unable to appreciate the nature or wrongfulness of his acts. The experts are permitted only to present and explain their diagnoses, which can include whether or not the defendant had a severe mental disease or defect and what the characteristics of such a disease or defect may have been. See S. Rep. 98-225, 98th Cong., 1st Sess. 225, 227, 230-231 (1983).

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the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

(b) Burden of proof.—The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

[3] Rule 704, Fed. R. Evid., provides:

Opinion on ultimate issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Congress recognized that under prior law, an expert witness in an insanity case could testify about so-called "ultimate" issues, such as whether the defendant was "insane" or whether he lacked the capacity to distinguish "right from wrong" (S. Rep. 98-225, *supra*, at 225). The Senate Committee stated that its purpose in limiting the scope of expert testimony in insanity cases was "to eliminate the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate legal issue to be found by the trier of fact" (*id.* at 230). As the report explained (*id.* at 231, quoting American Psychiatric Association Statement on the Insanity Defense 18-19 (Dec. 1982)):

> [I]t is clear that psychiatrists are experts in medicine, not the law. As such, it is clear that the psychiatrist's first obligation and expertise in the courtroom is to "do psychiatry," i.e., to present medical information and opinion about the defendant's mental state and motivation and to explain in detail the reason for his medical-psychiatric conclusions. When, however, "ultimate issue" questions are formulated by the law and put to the expert witness who must then say "yea" or "nay," then the expert witness is required to make a leap in logic. He no longer addresses himself to medical concepts but instead must infer or intuit what is in fact unspeakable, namely, the probable relationship between medical concepts and legal or moral constructs such as free will. These impermissible leaps in logic made by expert witnesses confuse the jury. [Footnote omitted.] Juries thus find themselves listening to conclusory and seemingly contradictory psychiatric testimony that defendants are either "sane" or "insane" or that they do or do

> not meet the relevant legal test for insanity. This state of affairs does considerable injustice to psychiatry and, we believe, possibly to criminal defendants. * * *
>
> Psychiatrists, of course, must be permitted to testify fully about the defendant's diagnosis, mental state and motivation (in clinical and commonsense terms) at the time of the alleged act so as to permit the jury or judge to reach the ultimate conclusion about which they and only they are expert. Determining whether a criminal defendant was legally insane is a matter for legal fact-finders, not for experts.

In this case, the district court allowed Dr. Burglass to testify that petitioner suffered from a mental disease and to explain the characteristics of that disease. Indeed, the district court gave Dr. Burglass great leeway in this regard (see Pet. App. 11). Dr. Burglass testified that petitioner was suffering from substance abuse disorder, marijuana dependence, and physiological damage to the brain (II Tr. 473-474). He further testified that the characteristics of this disorder were rapid fluctuation between sanity and insanity, compromised rational judgment, and an impairment of the ability to discriminate between types of conduct (II Tr. 477-480). As the court below explained (Pet. App. 11), if a characteristic of petitioner's mental disease had been an inability to appreciate the wrongfulness of one's conduct, Dr. Burglass could have testified to that medical fact. A particular individual's inability to appreciate the wrongfulness of his acts, however, is the legal definition of insanity. It was therefore proper for the district court to prevent Dr. Burglass from testifying that petitioner was unable to appreciate the wrong-

fulness of his acts. That was an issue for the jury alone to decide. See *United States* v. *Mest*, 789 F.2d 1069, 1071 (4th Cir. 1986), cert. denied, No. 85-7202 (Oct. 6, 1986) (finding improper the question: " '[D]o you have an opinion as to whether or not [the defendant] at the time of this alleged event could by virtue of his mental condition, discern the wrongfulness of his behavior and had the capacity to conform his behavior to the requirements of the law should he have so chosen?' ").[4]

2. Petitioner next contends (Pet. App. 9-11) that the verdict form used by the district court was misleading because it caused the jury to believe that even if petitioner was insane, he still could have been guilty of committing the crimes. This claim is meritless.

Where the issue of insanity is raised, the jury or the court (in the event of a bench trial) must find the defendant either (1) guilty, (2) not guilty, or (3) not guilty by reason of insanity (18 U.S.C. (Supp. III) 4242(b)). In this case the district court's instructions and verdict form did not present the three possibilities simultaneously. Instead, the court indicated that the jurors should approach the insanity question sequentially, first indicating whether they found the defendant guilty or not guilty and then, if they answered "Guilty" to any particular count, indicating whether they found petitioner not guilty only by reason of insanity.

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[4] The Eleventh Circuit recently applied this principle in *United States* v. *Edwards*, No. 86-5373 (June 12, 1987), where the court of appeals upheld the district court's decision to admit expert psychiatric testimony that discussed the usual symptoms of a mental disorder without expressing a specific conclusion about the defendant's status under the relevant legal standard.

Petitioner cannot now object to the instructions and the verdict form, because he did not object at trial. Indeed, petitioner's counsel specifically approved of the form used. Prior to closing instructions, the court inquired of the parties whether they had any objection to the verdict form the court had prepared (III Tr. 503-504). As originally prepared, the verdict form directed the jury to indicate as to each count whether they found the defendant (1) guilty; (2) not guilty; or (3) not guilty only by reason of insanity. The form directed that if the jurors answered any count "guilty," they should then indicate whether they found petitioner "not guilty" only by reason of insanity. The prosecutor objected to the form in that version because the instructions appeared repetitive and confusing. III Tr. 504. The court then suggested an alternative version of the verdict form to which petitioner now objects (III Tr. 503-504). Petitioner's counsel stated that he saw no problem with the format suggested by the court, and that in his view he "[did not think] it ma[de] any difference" (III Tr. 505-506). Having specifically acquiesced in the present form, petitioner now can challenge the district court's jury charge and the verdict form only if they constituted plain error. See, *e.g.*, *United States* v. *Young*, 470 U.S. 1, 15-16 (1985); *United States* v. *Frady*, 456 U.S. 152, 163 (1982). Under this standard, the court of appeals correctly rejected petitioner's claim.

Although, as the court of appeals noted (Pet. App. 13), the verdict form used by the district court might conceivably have implied that "not guilty by reason of insanity" is a subspecies of "guilty," it seems unlikely that the jury was misled in that fashion or that any misconception on the jury's part could have

affected the verdict. The district court's verdict form reflected, correctly, that insanity is the only difference between a defendant who is guilty and one who is not guilty only by reason of insanity. The form also suggested that the jury should follow the permissible course of assessing the insanity question separately. Most importantly, the form made clear to the jurors that if they found petitioner to be insane at the time he committed the crimes in question, they would have to find him "not guilty by reason of insanity." Indeed, as petitioner's counsel himself remarked at the time he agreed to the changes in the verdict form suggested by the court, "[i]t would be an extraordinarily confused jury not to be able to figure [the verdict form] out, in view of the opening and anticipated closing" (III Tr. 506).

The form made it possible for the jury, as to each count, to find petitioner guilty, not guilty, or not guilty by reason of insanity. The jury found petitioner guilty on three counts and, in accordance with the court's instructions and the instructions written on the verdict form, noted that for those three counts petitioner was not found to be "not guilty only by reason of insanity." The jury also found petitioner not guilty on two counts, and, in accordance with the court's instructions and the directions on the verdict form, it did not signify whether the acquittal was based on insanity or on the merits. Those circumstances make it virtually impossible for petitioner to have been prejudiced, as he suggests (Pet. 10), by the jury's believing that it could convict him although finding that he was insane.

In sum, as the court of appeals explained, the district court's instructions and the form made no real difference in the jury's analysis of the case.

The circumstances demonstrate that if the district court had simply listed the three possible verdicts under 18 U.S.C. (Supp. III) 4242(b), "the jury would have found [petitioner] guilty on three counts and not guilty (on the merits) on two counts" (Pet. App. 14).

3. Finally, petitioner contends (Pet. 11-13) that the prosecutor's reference in closing argument to "other acts [petitioner] has committed or will commit" prejudiced petitioner's right to a fair and impartial trial. Although, as the court of appeals found (Pet. App. 7), the prosecutor's comment was "indisputably improper," it did not justify a reversal of petitioner's convictions. As this Court has recently made clear (*United States* v. *Young*, 470 U.S. at 11-12), inappropriate prosecutorial comments must be examined in the context of the trial to determine whether they constituted prejudicial error. Reversal is warranted only if the remarks in question prejudiced the defendant's substantial rights (*United States* v. *Stefan*, 784 F.2d 1093, 1100 (11th Cir. 1986), cert. denied, No. 86-363 (Oct. 6, 1986); *United States* v. *Murphy*, 768 F.2d 1518, 1534 (7th Cir. 1985), cert. denied, No. 85-924 (Feb. 24, 1986)).

No substantial rights of petitioner were prejudiced. The prosecutor's comment was isolated, and petitioner's counsel himself conceded at trial that he did not believe that the prosecutor intended to make the statement (III Tr. 669). The context of the remark suggests that the jury would not have thought it to have independent, affirmative significance. The prosecutor, in his rebuttal summation, was responding to the suggestion made in closing argument by petitioner's counsel that because there were still outstanding charges pending against petitioner, it would be a

long time before petitioner went free even if the jury acquitted him of the instant charges. The main point of the procecutor's remarks, accordingly, was the perfectly proper one that the jury should consider the case on its own merits and not consider what might happen to petitioner in other proceedings. Moreover, the court instructed the jurors the next morning that they were not to consider the prosecutor's comment concerning anything petitioner might or might not do in the future, and that their only concern should be whether petitioner was guilty of the crimes charged in this case. The court of appeals' finding that petitioner was not prejudiced by the prosecutor's comment warrants no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1987

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